FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 27 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-1088 and 78-1217

In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY A. KISSINGER, PETITIONER

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PETITIONERS

v.

HENRY A. KISSINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

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1. The courts below held (Pet. App. 49a, 54a-55a) that the FOIA authorizes a suit to compel agencies to retrieve documents that are in the possession of third parties at the time FOIA requests are made, where the documents are "records" within the meaning of the Federal Records Act, 44 U.S.C. 2901 *et seq.*, and the Records Disposal Act, 44 U.S.C. 3301 *et seq.*[1] Our primary submission to

[1]For convenience, we refer hereafter to documents that are records under these acts as "FRA records."

the Court is that this holding is erroneous because the FOIA comprehends only documents that are in the possession and control of the agency and because the records acts provide no private right to enforce any duty an agency may have to create or to retrieve FRA records.

Neither RCFP nor MAP contends (see RCFP Br. 81-82, 97; MAP Br. 23) that the records acts authorize citizens to compel agencies to retrieve FRA records. Instead, they argue, offering different theories, that the FOIA itself must be construed to require agencies to retrieve "agency records" under the FOIA. RCFP contends (Br. 81-82, 97) that FOIA records are equivalent to FRA records, that the notes are FRA records, and that nothing in the FOIA exempts from disclosure records outside the agency's possession. With a broader sweep, MAP contends (Br. 23-25) that even nonrecord materials outside the agency must be returned under the FOIA, if the materials reflect government activities, in order to facilitate the public's "right to know."

The FOIA, however, only forbids "withholding" of "agency records." The natural meaning of these terms comprehends a failure to produce materials that are in the actual possession and control of the agency.[2] The legislative history seems clear that this was Congress' intent. As we explain in our opening brief at pages 35-37

[2]As we point out at page 38 n. 26 of our opening brief and pages 13-14 n. 14 of our brief in *Forsham* v. *Harris*, No. 78-1118, an agency has possession and control when the record is bailed to a third party with an undisputed right to its return on request. Contrary to MAP's claim (Br. 6, 9-10), the Library of Congress is holding the notes under a disputed claim to possession. Thus, the State Department does not now have possession or control of the notes. (We have served copies of our brief in *Forsham* on all parties in this case.)

and in our brief in *Forsham* v. *Harris*, No. 78-1118, the FOIA was enacted in response to a specific problem—under Section 3(c) of the Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 238, agencies were "wrongfully withholding" materials that unquestionably were in their actual possession. There is not a single suggestion in the voluminous legislative history of the FOIA that Congress intended agencies to *retrieve* FRA records or any other materials not in their possession in order to make them available to the public. This legislative definition of the evil addressed by the FOIA gives precise meaning to the words "withhold" and "agency record": only non-exempt documents in the possession of the agency must be made available. See, *e.g.*, *Johansen* v. *United States*, 343 U.S. 427, 431 (1952).[3]

[3]Contrary to RCFP's suggestion (Br. 86-87), there is no reason to believe that this construction of the FOIA will invite violations of the FRA. Even before the FOIA, Congress concluded that violations of the FRA, including any violations motivated by a desire to prevent disclosures under the public information section of the APA, to prevent disclosures in litigation, to prevent disclosures to superiors, or to prevent disclosures to Congress, were adequately policed by GSA oversight, by the records management responsibilities of each agency (44 U.S.C. 2901-3107), and by Congress. Nothing in the FOIA or its legislative history hints that Congress felt that these measures would be inadequate to protect against any additional incentive created by the FOIA to violate the FRA.

Although we agree with MAP (Br. 17-20) that broad equitable remedies may be invoked once an FOIA violation is proven, we stress that the critical threshold question is whether any FOIA violation has occurred. For this reason, MAP's reliance on the All-Writs Act, 28 U.S.C. 1651(a), is misplaced. As illustrated by *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172, 174 (1977), that statute comes into play only to implement a court determination otherwise lawfully reached. The All-Writs Act thus has no application in FOIA suits prior to the finding of an FOIA violation (except in the rare case, not presented here, where a court, in order to preserve its jurisdiction, orders a third party not to dispose of documents pending a judicial determination whether they were the subject of agency withholding in violation of the FOIA).

2. If the Court holds that the FOIA requires an agency to retrieve FRA records relinquished before an FOIA request is made for them, then the Court must consider a series of related questions concerning how courts will determine whether the requested materials are FRA records.

(a) First, the Court must consider the extent to which an agency has discretion to categorize preliminary worksheets, drafts, working papers, and the like as nonrecord materials. The courts below seemed to conclude that no such discretion exists (Pet. App. 54a-55a). As we pointed out in our opening brief (Br. 27-28, 39-41), however, the statutory definition of "record" adopted in 1943 in the Records Disposal Act (44 U.S.C. 3301) necessarily recognizes that not all documents generated in the scope of agency employment are "appropriate for preservation." The definition of "record" in 44 U.S.C. 3301 was adopted to "place the responsibility in the first instance upon agencies for determining what documentary materials should and what should not be preserved" and to "make it clear that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." See H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943), and pages 40-41 n.28 of our opening brief.

RCFP argues, however, that agencies have no discretion to define the scope of nonrecord materials and that the scope of such materials is inflexibly, albeit impliedly, fixed by 44 U.S.C. 3301.

(i) RCFP contends (Br. 43 n.37) that the phrase "in the first instance" in the 1943 House report simply meant that agencies would make recommendations to GSA for destruction of old records and that GSA would make the final decision. But the legislative history clearly refers to

the threshold determination of "what *documentary materials* should and what should not be preserved" as a "record," making it clear that agencies need not categorize "every scrap of paper on which writing or printing appears as a record." H. Rep. No. 559, *supra*, at 1. The legislative history does not refer to the subsequent determination of what records—once they have been designated as records—should be preserved.

Moreover, once it is recognized that the threshold decision involves the exercise of discretion, it necessarily follows that it is the discretion of the agency—not that of the GSA or the Archivist—that Congress intended to be exercised in determining what is "appropriate for preservation." In 1943, there was no GSA, and the role of the Archivist was limited, as it had been since 1939 (see Pub. L. No. 295, 53 Stat. 1219), to reviewing agency proposals for the destruction of old records. The 1943 legislation did not assign any responsibilities, even advisory responsibilities, to the Archivist in assisting the agency to draw the line between record and nonrecord materials. 57 Stat. 380. In 1950, the Federal Records Act incorporated this definition of "records." See 44 U.S.C. 2901(1). The FRA also emphasized even more clearly that agencies have a measure of discretion in defining what is and is not a record by requiring agencies to establish records management programs that balance, in the context of the record keeping needs of the particular agency, the competing statutory goals of (a) "accurate and complete documentation" of "policies and transactions" of the government and (b) avoidance of the "creation of unnecessary records" and "unnecessary Federal paperwork." 44 U.S.C. 2902(1), (2), (3), (6) and 3101-3102.

(ii) Contrary to RCFP's submission (Br. 50-55), nothing in the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 44 U.S.C. 2201-2207, redefines the scope of a "record" under 44 U.S.C. 3301. First, the statutory definition of a Presidential record differs from the definition of "records" in Section 3301. Second, the House report on the 1978 Act (the only committee report) specifically noted that "[t]o the extent that certain categories of documentary materials are not considered to be records under [44 U.S.C. 3301], the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 8, 10 (1978). Thus, rather than eliminate the practice of agencies' defining the scope of nonrecord materials, the 1978 Act follows "the practice that has evolved in the administration of [the Federal Records Act]." *Ibid.*

(iii) Nor do the Administrator's responsibilities under the FRA eliminate agencies' discretion in determining what documentary materials should be regarded as nonrecord materials, as RCFP suggests (Br. 55-57). To be sure, under 44 U.S.C. 3102(2),(3) agencies must comply with 44 U.S.C. "2101-2113, 2501-2507, 2701, 2901-1909, and 3101-3107" and any GSA "regulations" issued thereunder and must "cooperate" with GSA in applying "standards, procedures and techniques designed to improve the management of records * * *." But none of the cited statutory provisions authorize GSA "regulations" governing the scope of nonrecord materials or the scope of records management programs.[4] For such matters, the

[4]Examples of GSA "regulations" authorized by the sections cited in 44 U.S.C. 3102(3) are regulations governing inter-agency transfers of records (44 U.S.C. 2908) and regulations governing safeguards against the removal or loss of records (44 U.S.C. 3105).

Administrator may only issue "standards, procedures, and guidelines." 44 U.S.C. 2904. Although agencies must "cooperate" in applying "standards, procedures, and guidelines," such provisions are not binding "regulations."[5]

(b) If the Court holds that agencies have "in the first instance" a measure of discretion in defining what government documents are not "appropriate for preservation" and are thus nonrecord materials, then it would be necessary to consider whether the agency's record management regulations classify the disputed materials as records. In many instances, an agency's regulations will specifically cover the issue, and the answer to this question will be clear. Here, however, the answer is not so clear. State Department regulations required Kissinger to prepare records "in the form of aide-memoire, memorandums of conversation, or memorandums to the file" of "[d]ecisions, commitments, and discussions of any significance which [were] oral in nature * * *." 5 FAM 423.2-1. As we explain at page 46 of our opening brief, Kissinger could have used the notes to prepare such memoranda and, assuming the memoranda were sufficiently complete, then throw away the notes (as nonrecord material). The difficulty presented by this case is that the record does not disclose (i) the extent to which such memoranda were, in fact, prepared and filed or (ii) the sufficiency of the official memoranda prepared by Kissinger, Eagleburger or others involved in the same conversations. These questions can only be answered by

[5]RCFP contends (Br. 56) that the FRA's legislative history shows that agencies are "required" to follow GSA standards and guidelines. The only support RCFP can muster for this proposition is an oblique reference in a letter from the Acting Comptroller General to Senator McClellan commenting on the pending FRA legislation, a comment that no legislator approved. See 96 Cong. Rec. 11096-11097 (1950).

examining the notes, and all other memoranda in the State Department files (prepared by Kissinger, Eagleburger or others), that record the conversations covered by the notes. However, none of these items is before the Court, and none has been examined by the courts below. A remand to the district court would be necessary for such an inquiry.

Assuming that such an inquiry revealed gaps in the State Department's records, then the further questions would be presented whether the telephone notes, despite their arguably informal nature, are records under 5 FAM 423.2-1. Resolving this ambiguity would require a further inquiry into the Department's practices in analogous circumstances and the existence of any authoritative interpretations of the agency's regulations.[6] If this inquiry revealed that any notes covering any gaps must be regarded as records, then any nonexempt notes should be produced under the FOIA. If this inquiry revealed that the notes must be regarded as nonrecord materials under the regulations, then the notes would not be FRA records and would not be subject to FOIA "retrieval."[7]

RCFP presents three arguments in an attempt to avoid a remand on these issues. First, RCFP contends (Br. 63-67) that under the State Department regulations the notes

[6]Insofar as the Legal Adviser construed ambiguities in State Department regulations (rather than addressed issues of general governmental property law) his construction would be entitled to deference. We do not believe that the Legal Adviser's memorandum is dispositive, however, because it assumed in part that adequate extracts would be made from the notes. To the extent this is not the case, the interpretation is not on point.

[7]Even if nonrecord materials in the possession of an agency must be made available under the FOIA, we assume that the courts below (given their reliance on the seemingly mandatory duty to retrieve FRA records) would not require retrieval of nonrecord materials in the hands of third parties. See our opening brief at 49-51 n.38.

are records because they do not meet the definition of personal papers (5 FAM 432). Even so, that does not foreclose the possibility that the notes are nonrecord materials rather than FRA records.[8]

Second, RCFP contends (Br. 75-77) that the State Department's definition of nonrecord materials does not comprehend the notes and that the notes must therefore be records. RCFP would limit the phrases "rough drafts" and "working papers" to uncirculated "personal work product" that reflect no substantive "business communications." See RCFP Br. 30, 37, 43, 46 n.44, 49, 60, 75-77. This crabbed reading is not a practical construction of the relevant language. Every day, government employees make "substantive" notes of oral conversations, use the notes to prepare record memoranda, and then discard the notes. Every day, government secretaries prepare telephone messages for government employees and "circulate" notes for the employees called. Government files would burst at the seams if such notes had to be retained. A more reasonable construction is that the notes are not record materials, at least so long as the memoranda required by 5 FAM 423.2-1 are prepared.

[8]It is true that the "extracting requirement" applies only to personal correspondence, as RCFP states (Br. 65, 73). However, we use the term "extracts" to mean memoranda that satisfy the "memoranda" requirement of 5 FAM 423.2-1. We do not contend that employees may prepare extracts of existing records and then dispose of the records. We do contend that an agency has discretion to require employees to prepare final memoranda (or extracts) from working notes and thereafter to treat the notes as nonrecord materials.

Third, RCFP essentially contends (Br. 68-72) that those portions of the notes containing classified information are FRA records under State Department regulations.[9] This contention rests chiefly on the fact that retiring employees must surrender to the agency all documents containing classified information (A. 255). Even so, it does not follow that such materials are FRA records. Extra copies, which everyone would apparently agree are nonrecord materials (see RCFP Br. 69 n.62), are not elevated to record status merely because they contain classified information. Similarly, if the telephone notes are otherwise nonrecord materials, they are not elevated to record status merely because they contain classified information. The status of a document as record or nonrecord under the FRA is independent of the safeguards that attach to the protection of classified information (in whatever form it appears).[10]

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[9]Our opening brief incorrectly stated (at page 7) that State Department employees removed any classified information from the materials donated under the first deed. In fact, such materials were not removed by the State Department. Instead, the State Department protected the information by ensuring that the Library of Congress would provide appropriate security and access restrictions on the materials (see A. 43-46, 253). This error, however, does not affect our analysis.

[10]RCFP also contends (Br. 69-70) that under Exec. Order No. 11652, 3 C.F.R. 658 (1971-1975 compilation), any portions of the notes containing classified information could only have been disposed of by the State Department in accordance with the Disposal Act. The Executive Order makes clear, however, that classified information, including "working files," may be disposed of in accordance with not only the Disposal Act but also "other applicable statutes" (3 C.F.R. 686 (1971-1975 compilation)). This includes the authority under both the Disposal Act and the FRA to dispose of nonrecord material by donation rather than destruction. In fact, RCFP acknowledges (Br. 69 n.62) that extra copies of records (which are nonrecord materials) containing classified information may be and often are donated to institutions whose security procedures are adequate to protect the

(c) The last question that would arise if the Court were to hold that a refusal to retrieve FRA records constitutes a "withholding" of "agency records" under the FOIA is the appropriate standard of judicial review of agency decisions under the FRA. If we are correct that agencies enjoy a measure of discretion in drawing the line between record and nonrecord materials, then, at most, the appropriate standard would be abuse of discretion. See 5 U.S.C. 702-706. A State Department regulation that does not require the retention of notes once memoranda satisfying 5 FAM 423.2-1 have been prepared would hardly seem to constitute an abuse of discretion. Rather, the regulation would appear to be a reasonable accommodation of the competing goals of the FRA to eliminate unnecessary files and to document adequately the business of the agency. Whether a regulation that classified contemporaneous notes of significant telephone discussions as nonrecord materials in the absence of other record memoranda would amount to an abuse of discretion is a premature question in the present posture of this case. Such a question should be considered only if it were to be established on remand that there are in fact such undocumented discussions and that the State Department's regulations nonetheless regard the notes of those discussions as nonrecords materials.

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information from unauthorized disclosures. See NSC Directive, 3 C.F.R. 1085 (1971-1975 compilation). In the present case, the Library of Congress agreed to provide security procedures acceptable to the State Department (A. 42-46, 253). If the State Department determines that classified information in the notes or materials is not sufficiently protected, it will make further appropriate arrangements with the Library of Congress.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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